

In the Supreme Court of the State of Alaska

Matthew Foy,
Petitioner,

v.

State of Alaska,
Respondent.

Supreme Court No. **S-18513**

Order

Petition for Hearing

Date of Order: **1/12/2023**

Court of Appeals No. **A-13454**
Trial Court Case No. **2NO-18-00027CI**

Before: Winfree, Chief Justice, Maassen, Borghesan, and
Henderson, Justices [Carney, Justice, not participating.]

Matthew Foy petitioned for hearing from a 7/29/2022 opinion of the Court of Appeals.¹ The background, in brief, is as follows. After pleading guilty to an assault charge, Foy filed an application for post-conviction relief in the superior court, alleging he was the victim of malicious prosecution. The State moved to dismiss the application on two grounds: that the application failed to state a prima facie case of malicious prosecution and that the application was untimely in that such a claim should have been raised before Foy entered his guilty plea. The superior court granted the State's motion on the first ground; it did not rule on the timeliness issue.

Foy appealed to the Court of Appeals. In his opening brief he argued that the superior court, in its dismissal order, had failed to apply the proper two-prong

¹ *Foy v. State*, 515 P.3d 659 (Alaska App. 2022).

analysis to his vindictive prosecution claim when considering whether he had stated a prima facie case.² The State's appellee's brief, before addressing the argument Foy was making on appeal, first asserted an alternative ground for affirmance: the timeliness issue the superior court had not reached. Foy responded to this alternative argument in his reply brief. He cited Alaska Criminal Rule 12(b) and an Alaska case for the proposition that certain defenses and objections had to be raised prior to trial, but he pointed to other Alaska cases in support of an argument that violations of a defendant's due process rights under the federal and state constitutions could be raised for the first time on applications for post-conviction relief. In support of the proposition that such claims are "jurisdictional," and thus properly raised at any time, Foy cited Judge Mannheimer's concurring opinion in *Stough v. State*.³

The Court of Appeals affirmed the dismissal of Foy's application for post-conviction relief, though on the timeliness ground the State had raised as an alternative ground for affirmance. In the Court of Appeals' view, Foy's argument that vindictive prosecution claims were jurisdictional rested solely on the concurrence in *Stough*, which in turn relied solely on federal law; later federal cases had weakened the concurrence's rationale, and, the Court of Appeals concluded, federal law no longer supported Foy's argument. But the Court of Appeals declined to consider "whether state law may be different as that issue has not been briefed to us and the only authority

³ 2000 WL 1124506 (Alaska App. Aug. 9, 2000) (unpublished).

² Relying on *Atchak v. State*, 640 P.2d 135, 145-46 (Alaska App. 1981), Foy described the two analytical prongs as first "consider[ing] the state's 'stake' in deterring the exercise of the specific constitutional or statutory right asserted by the defendant" and, second, "scrutiniz[ing] the state's 'conduct for a connection between the assertion of a right by the accused and an increase or threatened increase in charges by the state.' "

Foy cites — the unpublished concurrence in *Stough* — explicitly relies only on federal law.”⁴

We disagree with the Court of Appeals’ conclusion that Foy’s jurisdictional argument did not rely on state law. Leading into his discussion of the *Stough* concurrence, Foy asserted that Alaska law “has recognized that prosecutorial vindictiveness violates a defendant’s right to due process under both the federal and the state constitution,” citing *Dyer v. State* and the due process clauses of both constitutions.⁵ A conclusion that Foy’s claim would be untimely under federal law is not necessarily dispositive of an argument that the Alaska Constitution allows it.

THEREFORE, IT IS ORDERED:

The Petition for Hearing is **GRANTED** to this limited extent: The case is remanded to the Court of Appeals with direction that it accept a late-filed petition for rehearing on whether, before affirming on the alternative timeliness ground raised by the State, the court must decide whether the State’s argument is consistent with the Alaska Constitution.

Entered at the direction of the court.

Clerk of the Appellate Courts


Meredith Montgomery

⁴ *Foy*, 515 P.3d at 662 n.20.

⁵ 666 P.2d 438, 442 (Alaska App. 1983) (citing U.S. CONST. amend. XIV, § 1; ALASKA CONST. art. I, § 7).

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cc: Court of Appeals Judges
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